90-1186

NO. 90-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

PATRICK HENRY LENGYEL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the confrontation clause violated in this child molestation case when the 3-year-old victim's statements to her mother and to her psychotherapist were admitted pursuant to evidence Rule 803 without a showing of unavailability?

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OPINION BELOW

The Arizona Court of Appeals reversed Lengyel's convictions for child molestation holding that Lengyel's right to confrontation was violated because the trial court admitted the child victim's hearsay statements even though the court did not find the victim was unavailable and the state did not call her to testify. The state appellate court held that Lengyel's right to subpoena the victim himself was illusory. The court also rejected the state's argument that any error was harmless. The opinion is appended here as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals which the state asks this Court to review was filed on April 3, 1990. The Arizona Supreme Court denied the state's petition for review on December 4, 1990, with one judge noting to grant review. (Appendix B.) This petition is filed within 90 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

The victim in this case was Lengyel's natural daughter, Annie. The crimes were alleged to have occurred before May 1986. Lengyel had a stormy relationship with the victim's mother with whom he lived in an off-and-on-again relationship. Although Lengyel was not married to the mother, Lengyel was legally declared the girl's father and required to make child support payments. The mother suspected that something was not proper about Lengyel's conduct toward the girl but she ignored it for a long time. For example, the mother found the girl naked when she came home after leaving the girl in Lengyel's care. The mother also noticed that Lengyel had been taking baths with the toddler. She once observed that Lengyel had an erection while holding the girl in his lap. At

one time he almost admitted having sexual feelings toward the girl. When the mother confronted Lengyel with his sexual behavior toward the girl, he did not deny it, but said that the mother left him sexually unsatisfied.

One time when Lengyel and the mother were living apart, Lengyel took the girl for a visit. When the girl returned home she complained of her "butt" hurting. Another time when Lengyel brought her home the girl had completely forgotten all of her potty training. The girl had nightmares and difficulty sleeping. The mother testified that her daughter was afraid of Lengyel. One day in October 1987 the girl awakened from a nap, said a monster was going to get her and volunteered that "daddy put sticks in my pee-pee." She had been talking to her father on the telephone about a week

before she made these statements. The girl went on to elaborate that she and her father played "doggy games" where her father licked her on the "butt." The mother contacted the authorities.

At trial the girl's psychotherapist testified that the girl told her that "daddy stuck his pee-pee in my pee-pee and he "put his stick up my pee pee." The girl also said that daddy put his "pee-pee" in her mouth and in her butt. She also claimed that her father "puked" on her with something pink and pointed to her mouth. Lengyel was a pilot and often flew to Mexico with the girl. The girl related that the father's friend told her to say that daddy only did these things in Mexico. The victim also said Lengyel had threatened to fly her down to Mexico and drown her in a lake.

The girl told a consistent story to a social worker on a videotape admitted at trial. In it she refers to Lengyel as daddy Pat or Patrick and describes being "shot" with Lengyel's "pink gun" that shoots "white smoke." The examining pediatrician testified that the girl had an abnormal vagina and anus consistent with multiple episodes of molestation. Lengyel called various character witnesses and gave a narrative of his version of events.

Annie made three out-of-court statements in all, one to her mother, Yalonna Chadwick, one to her psychotherapist, Jacquie Scheider, and another videotaped interview with a social worker, Susan Ashling. The Ashling videotape was admitted by stipulation. The confrontation issue therefore concerns only the admissibility of the other two statements.

By motions filed 3 weeks before trial the state indicated that it was not going to call the victim as a witness at trial. The trial court denied the state's request to find that the victim was unavailable due to the trauma that would befall her if she had to testify in spite of the fact that the request was supported by expert affidavit. The admissibility of her statements were therefore considered under Rule 803, Arizona Rules of Evidence, where the availability of the declarant is immaterial.[1] The trial court held that the girl's statements to Scheider, the psychotherapist, were admissible under Rule 803(4), the medical diagnosis or treatment exception to the hearsay rule.

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1. The wording of Arizona Rule 803 is identical to Rule 803 of the federal rules of evidence.

Scheider, a practicing therapist, saw the victim, Annie, on seven occasions. She needed Annie's statements to adequately perform her job as a therapist. The victim's statements here were child-like, they showed an unusual knowledge of sexual matters for a 3-year-old, and they were accompanied by physical and emotional injuries. Scheider had no knowledge of the details of the case before she talked to the girl, and Annie gave statements consistent with what she told others. The trial court further held that even if the statements did not meet the medical diagnosis or treatment exception to the hearsay rule, they were admissible under the residual exception found in Rule 803(24) due to the equivalent guarantees of trustworthiness.

The trial court also admitted Annie's statements to her mother under the residual exception of Rule 803(24), Arizona Rules of Evidence. The trial court believed that the spontaneity and consistency of the statements, the child-like terminology, the manifestation of unusual sexual knowledge, and the physical corroboration to be offered by the pediatrician, gave the statements the equivalent guarantees of trustworthiness to make them admissible.[2]

With respect to Lengyel's ability to subpoena the witness himself, the record

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2. Petitioner is aware that since this case was tried this Court held in Idaho v. Wright, 497 U.S. ___, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), that other evidence may not be used in determining the trustworthiness of the challenged statements. However, petitioner believes that the record shows that even without the corroborating evidence the circumstances that surround the little girl's statements make them worthy of belief.

shows the following. Lengyel was representing himself after having been advised of the dangers of self-representation. The trial court appointed advisory counsel to assist him. Before trial, Lengyel indicated that advisory counsel had helped him subpoena everybody he needed. Following swearing of the jury, Lengyel indicated that he now wanted the victim to testify also. The trial court advised the pro per defendant that it was his obligation to find her and have her subpoenaed. The next day before any testimony was taken, the trial court reminded Lengyel again that if he wanted the victim to testify he had to subpoena her. Lengyel never indicated that he had asked advisory counsel to help him locate or subpoena the girl.

On the second day of trial a subpoena was issued for Annie Lengyel, in care of the victim's mother, Lonnie Chadwick. The address given was "superior court." Ms. Chadwick was served at the courthouse. The next day the state pointed out that the victim, Annie, lived in California, and that she had not been properly served and would not be appearing for trial. The trial court agreed that there had been no proper service and that Lengyel himself was entirely at fault because he did not attempt to have advisory counsel get a subpoena for the out-of-state witness before the trial was underway.

REASONS FOR GRANTING THE WRIT

In this Court's recent decision in Idaho v. Wright, 497 U.S. ___, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), this Court did not reach the question of

whether there must be a showing of unavailability before a child's out-of-court statements may be admitted. 110 S. Ct. at 3147, 111 L. Ed. 2d at 647. This case presents that unavailability showing question both with respect to the medical diagnosis or treatment exception and the residual exception to the inadmissibility of hearsay found in Rule 803(4) and Rule 803(24), Arizona Rules of Evidence. The text of those rules is the same as the federal counterpart. Rule 803(4), Arizona Rules of Evidence, provides:

> Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Rule 803(24), Arizona Rules of Evidence, provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearsay to provide the adverse party with fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The hearsay exceptions set forth in Rule 803 do not require a showing of unavailability. The difference between Rule 803 and Rule 804 is discussed in McCormick:

> The pattern of the exceptions as evolved by the decisional process of the common law and generally in effect today divides the hearsay exceptions into two groups. In the first, the availability or unavailability of the declarant is not a relevant factor: the exception is applied without regard to it. In the second group, a showing of unavailability is a condition precedent to applying the exception. The theory of the first group is that the out-of-court statement is at least as reliable as would be his testimony in person, so that producing him would involve pointless delay and inconvenience. The theory of the second groups is that, while it would be preferable to have live testimony, if the declarant is unavailable, the out-of-court statement will be accepted.

C. McCormick, Law of Evidence § 253, at 753 (3d ed. E. Cleary 1984) (footnotes omitted).

The medical diagnosis or treatment exception is a firmly rooted exception

whose reliability may be presumed for the purposes of the Confrontation Clause. See, e.g., United States v. Provost, 875 F.2d 172 (8th Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 170, 107 L. Ed. 2d 127 (1989); United States v. DeNoyer, 811 F.2d 436 (8th Cir. 1987); United States v. Renville, 779 F. 2d 430 (8th Cir. 1985); United States v. Nick, 604 F.2d 1199 (9th Cir. 1979). Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability. Idaho v. Wright, 497 U.S. at ___, 110 S. Ct. at 3147, 111 L. Ed. 2d at 654. The argument to follow also presumes that the statements admitted under the residual exception of Rule 803(24) meet the test of Idaho v. Wright, 497 U.S. ___, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). In other words, the statements were admissible under the

rules of evidence. And that is one of the flaws in the Arizona appellate court's decision. It does not analyze admissibility under the evidence rules. It immediately equates the lack of a finding of unavailability with a per se violation of the Confrontation Clause. (Appendix A.) The appropriate analysis would have been to see what type of hearsay the state was offering before going on to Confrontation Clause analysis.

This Court has indicated that a demonstration of unavailability may not always be required before hearsay may be admitted without denying a defendant his or her right to confrontation. Ohio v. Roberts, 448 U.S. 56 n.7 at 63, 100 S. Ct. 2531 n.7 at 2538, 65 L. Ed. 2d 597 n.7 at 604, (1980). In United States v. Inadi, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986), this Court

subsequently said that a showing of unavailability was not a condition to admission of out-of-court statements of a nontestifying coconspirator. Inadi limited the Roberts unavailability analysis to prior testimony. Some courts have relied on Inadi in holding that the Confrontation Clause does not require a showing of unavailability before admission of out-of-court statements of child victims. People v. White, 198 Ill. App. 3d 641, 144 Ill. Dec. 722, 555 N.E.2d 1241 (1990), appeal denied, 133 Ill. 2d 570, 149 Ill. Dec. 335, 561 N.E.2d 705 (1990) (4-year-old's statements admitted pursuant to excited utterance and medical diagnosis exceptions without showing of unavailability; disagreeing with the concurrence in Nelson v. Ferrey, infra); People v. Lusk, 218 Cal. App. 3d 386, 267 Cal. Rptr. 146 (1990) (10-year-old's

statement admitted as spontaneous declaration without showing of unavailability). In a case involving the sexual assault of a 3-year-old, Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 835, 107 L. Ed. 2d 831 (1990), the Seventh Circuit also said that the unavailability of the child witness was not the sine qua non of allowing her out-of-court statements to be used in evidence. 874 F.2d at 1230. Other courts have extended the Inadi reasoning to adult hearsay admissible under Rule 803, the availability immaterial rule. State v. Palomo, 113 Wash. 2d 789, 783 P.2d 575 (1989), cert. denied, ___ U.S. ___, 111 S. Ct. 80, 112 L. Ed. 2d 53 (1990); State v. Wilson, 719 S.W.2d 28 (Mo. App. 1986). If the law were otherwise, there would be no difference

between Rule 803 and Rule 804 of the evidence rules as discussed in McCormick. Every time the state offered hearsay a nonavailability finding would be automatically required, but that is not how the evidence rules are worded.

Applying the Inadi reasoning to child sex victims' statements like the one in this case is particularly appropriate. Like the statements made in furtherance of a conspiracy, this little girl's statements in a non-trial setting are not replicable at trial. It is unique evidence that derives its probative value from the circumstances in which it was made. She talked to her therapist in a relaxed setting with things like play therapy designed to make her comfortable in talking to an adult. This evidentiary value created by circumstance is also true for the girl's unsolicited comments

to her mother, statements made without prodding and without reflection when she awoke from her nap. There is nothing that the availability of the witness for cross-examination can add to their reliability. What is to be gained in the truth-determining process by having the father, who is representing himself, personally question the 3-year-old child on the witness stand about what he did with her when she was 2 1/2 years old? As noted in Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987), since it is a fact well known to child abuse experts that sexually abused youngsters often do recant, the unavailability requirement should not attach to their testimony anymore than it did to the coconspirator's statements in Inadi. 732 S.W.2d at 823.

The Arizona court's opinion is also in error on the confrontation waiver issue. The court held that because the state had asked to have the victim declared unavailable, the pro per defendant was relieved of any responsibility to have his advisory counsel get a subpoena, just like he subpoenaed other witnesses to insure their presence at trial. There was no allegation in the trial court that the state was doing anything to obstruct Lengyel's access to the victim. There was an unsubstantiated claim to this effect on appeal, but the appellate court recognized in a footnote that there was no record to support it. Lengyel never said he wanted to call her until the eve of trial. In United States v. Cree, 778 F.2d 474 (8th Cir. 1985), the defense failure to call the 4-year-old victim was deemed a wavier of the confrontation

issue where there had not been a definite pre-trial ruling on the witness's qualification to testify. See also Inadi, 475 U.S. at 397, 106 S. Ct. at 1127, 89 L. Ed. 2d at 396, discussing a defendant's right to call the witness himself as relevant to the Confrontation Clause analysis. There is no reason to apply a different standard to a defendant like Lengyel who has opted to represent himself after all the required warnings against self-representation.

Finally, the Arizona court's rejection of the state's harmless error argument should be reviewed. Corroborating evidence is appropriately considered in determining whether any error in admitting the statement might be harmless. Idaho v. Wright, 497 U.S. at ___, 110 S. Ct. at 3150-51, 111 L. Ed. 2d at 657. Corroborating

evidence in this case consisted of the examining pediatrician testifying that the girl had an abnormal vagina and anus consistent with multiple episodes of molestation. The toddler told a consistent story to a social worker on a videotape admitted by stipulation at trial. There were also the mother's observations about the way the girl acted after being left in Lengyel's care and the way he acted toward the girl.

CONCLUSION

The state requests that this Court grant review in this case to address the question left open in Idaho v. Wright, that is, whether the Confrontation Clause requires a finding of unavailability before a child sex victim's statements may be admitted under the hearsay Rule 803 medical diagnosis or treatment exception and the residual exception. As

a further delination of the relationship between the hearsay rules and the Confrontation Clause, this case also presents a question whether the defense failure to properly subpoena the child witness fatally weakens the defendant's Confrontation Clause challenge. This case also presents an opportunity to apply the harmless error analysis using corroborative evidence as suggested in Idaho v. Wright.

DATED this 4th day of January, 1991.

Respectfully submitted,

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APPENDICES

[FILED APR 3, 1990]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 88-921
v.	)	DEPARTMENT A
PATRICK HENRY LENGYEL, Appellant.	)	MEMORANDUM DECISION (Not for publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of La Paz County

Cause No. CR-88-15

The Honorable Steven F. Conn, Judge

REVERSED AND REMANDED

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and
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and

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C O N T R E R A S , Presiding Judge

Appellant was tried before a jury and convicted of two counts of molestation of a child on two separate occasions between July 1985 and April 1986. He was sentenced to two consecutive terms of twelve years imprisonment. On appeal, we consider the issue of whether the trial court denied appellant his constitutional right to confront his accuser. We reverse because we conclude that the appellant was denied such right. We reach this conclusion based upon our determination that the trial court erred in admitting the victim's hearsay statements without an express finding that the victim was unavailable.

FACTS

The amended indictment charged appellant with the molestation of his natural daughter on two separate

occasions between July 1985 and April 1986. Appellant lived sporadically with his daughter and her mother until April 1986. The child was nineteen months to two and a half years old when the alleged molestations took place.

The mother testified that she became suspicious of appellant's activities with the child before the child turned two years old. Later, the mother noticed that the child frequently had nightmares and was incontinent, although she had been toilet trained. Initially, however, the mother did not report her suspicions to the authorities.

The mother also testified that one afternoon the child awoke from a nap crying. While still groggy, she told her mother that a monster was going to get her. The mother questioned her about the monster, and the child told her mother

that the monster was daddy. When asked what daddy had done to her, she purportedly told her mother, "he puts sticks in my pee-pee." Fearing her suspicions were correct, the mother, in October of 1987, reported her belief that her daughter had been sexually molested by appellant.

On October 30, 1987, the child was interviewed by Susan Ashling, a social worker at the Children's Hosital and Health Center, Center for Child Protection, in San Diego, California. She concluded that there had been vaginal-penile contact between the child and appellant. The entire interview was videotaped.

On this same day, the child was examined by Dr. Sylvia Strickland, a pediatrican. Dr. Strickland testified

that she found evidence of hypervascularity, abnormal blood vessels, in the child's genital area which had likely been caused by dry intercourse. She stated that the condition indicated numerous separate molestive episodes over a period of several months.

The child's out-of-court statements concerning the alleged molestations were admitted at trial through the testimony of the mother and the social worker. A videotape of the interview between the social worker and the child was also admitted and played to the jury in its entirety. Jackie Scheider, a pschotherapist-counselor at the Life Health Center of Parker, also testified to the child's out-of-court statements about the alleged molestations made during seven counseling sessions with the child.

Appellant firmly denied the allegations that he had molested his daughter and claimed that the child's mother had fabricated the story and turned his daughter against him.

DISCUSSIONS

Appellant, who was in custody, represented himself for most of the proceedings, including the trial. Prior to trial, the state filed a Motion for Protective Order and for Finding of Witness Unavailablity in which the state asserted that the child was unavailable to testify because she would be traumatized by the proceedings. The trial court withheld ruling on this motion. On the first day of trial, the trial court issued its ruling on this motion and specifically refused to find the child unavailable. The trial court pointed out, however, that the state need

not call the child as a witness. Appellant asserted his right to confront the child on the ground that she was the only person who could explain her out-of-court statements and the only person who had any knowledge of the alleged molestations. Upon appellant's request that the child testify at trial, the trial court pointed out that appellant had the right to subpoena her as a witness for the trial.

On the second day of trial, appellant attempted to subpoena the child by serving her mother, who appeared as a witness at the trial. The state objected to service on the mother, arguing that service on a minor child cannot be made solely by service on the mother. The trial court agreed. The trial court also pointed out to appellant that if the child was in the state of California, as

alleged by the prosecutor, appellant would need to follow the requiremnts of the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. A.R.S. § 13-14091 through 13-4096. Appellant objected to conducting the trial without the testimony of the child, stating that the child was the "only witness to the alleged crimes and without a witness all this other testimony has been opinions--other people's opinions."

The state did not call the child as a witness, and appellant was unable to subpoena the child as a witness at trial. However, the child's out-of-court statements as to the alleged molestations were admitted at trial through the testimony of her mother, the social worker and the psychotherapist-counselor. The trial court also admitted the videotape of the interview between the social worker and the child. In making its rulings admitting these hearsay statements, the trial court specifically ruled that there was no denial of

appellant's constitutional right to confrontation because "the defendant can and could at anytime have subpoenaed [the child] and have her brought into court and have been able to confront her face-to-face concerning these accusations . . . ." Appellant objected to the admission of the hearsay statements.

In its ruling on the admissibility of the hearsay statements, the trial court apparently interpreted Arizona law as not imposing any requirement on the state to try and produce an available declarant as a witness when hearsay statements of that declarant are to be used at trial. Although appellant's confrontation rights do not require the state to call the victim as a witness, State v. Valdez, 160 Ariz. 9, 12, 770 P.2d 313, 316 (1989), the admission of the child's hearsay statements into evidence at this trial

violated appellant's right to confront his accuser because the state did not make the required preliminary showing of unavailability of the witness for trial. State v. Robinson, 153 Ariz. 191, 203, 735 P.2d 801, 813 (1987); Cf. State v. Vincent, 159 Ariz. 418, 427, 768 P.2d 150, 159 (1989) (trial court must make individualized finding of necessity prior to admission of videotaped testimony of minors); State v. Allen, 157 Ariz. 165, 170, 755 P.2d 1153, 1158 (1988) (burden on state to prove unavailability when it offers declarant's out-of-court statements). Our supreme court has explained the relationship of the confrontation clause to the admission of hearsay statements of a victim of alleged child molestation as follows:

> The confrontation clauses of the state and federal constitutions guarantee

criminal defendants the right to confront their accusers. Ariz. Const. art. 2, § 24; State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983); U.S. Const. amend. VI; Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965). This right protects the accused's ability to confront and cross-examine his accusers face-to-face. Edwards, 136 Ariz at 180-81, 665 P.2d at 62-63.

"Notwithstanding its essential nature in securing a fair trial," however, "the confrontation clause has never been interpreted literally to require the exclusion of all statements of persons who do not appear at trial." 136 Ariz. at 181, 665 P.2d at 63.

"[C]onsiderations of public policy and the necessities of the case," Mattox v. United States, 156 U.S. 237, 243, 15 S. Ct. 337, 340, 39 L.Ed. 409 (1895), permit dispensing with confrontation at tria if two conditions are met: (1) the declarant's in-court testimony is "unavailable," and (2) the declarant's out-of-court statement bears adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 67, 100 S. Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

Robinson, 153 Ariz at 203, 735 P.2d at 813, see also id. at n. 15; accord Allen, 157 Ariz. at 170, 755 P.2d at 1158.

In this case, not only did the state not bear its burden of showing the declarant's unavailability, the trial court specifically refused to find her unavailable, and upheld the admission of the hearsay statements on the ground that the witness was available to be subpoenaed by appellant. The trial court's ruling that the victim was not "unavailable" is not contested in this appeal. It is our opinion that the state was required either to produce the declarant at trial or make a showing of unavailability, and, therefore, the admission of the child's out-of-court statements in this case violated appellant's constitutional confrontation rights.

We do not reach the question of whether the requirement that the state either produce the declarant at trial or make a showing of unavailability may be satisfied with a showing that the defendant could subpoena the declarant because we believe that, in this case, appellant's right to subpoena the victim was illusory. Prior to trial, the state, in its Motion for Protective Order and for Finding of Witness Unavailability, asked the court to preclude appellant from calling the child as a witness. On the first day of trial, when the trial court denied the motion, the trial court instructed appellant that he could subpoena the victim. At this late stage of the proceeding, it would have been nearly impossible for appellant, who was in custody, to have located the child and subpoena her, particularly in light of

the trial court's refusal to require the state to disclose her whereabouts when appellant asked for the court's assistance.[1]

The state argues that even if the admission of the hearsay testimony was error, it was harmless error. In support of this argument, the state asserts that because the videotape between the social worker and the child was admitted by

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1 We find troubling appellant's assertion that the state participated in making the victim unavailable. Although the state need not secure the attendance of witnesses for the defendant, if the defendant is unable to serve potentional witnesses because of "the suggestion, procurement, or negligence of the government," there would be a violation of the defendant's rights under the compulsory process clause of the Arizona and United States Constitutions. State v. Stewart, 131 Ariz. 407, 410, 641 P.2d 895, 898 (App. 1982). We cannot ascertain the truth of this alegation on this record.

stipulation, the hearsay statements were merely cumulative and, therefore, harmless. We decline to find harmless error in this case. Most of the evidence linking appellant to the alleged molestations of the child were the witnesses' recounting of statements made by the child. We have reviewed the videotape, and find that the hearsay statements testified to at trial went far beyond the somewhat vague and inconsistent references to the alleged molestations made in the videtaped interview. The witnesses' testimony as to the child's out-of-court statements, therefore, was not cumulative, and we cannot say that it is clear beyond a reasonable doubt that the jury verdict would have been the same had the hearsay statements not been admitted. See State v. McVay, 127 Ariz. 450, 453, 622 P.2d 9,

12 (1980); State v. Wilhite, 160 Ariz. 228, 772 P.2d 582 (App. 1989).

For the foregoing reasons, we reverse the judgment of conviction and remand the case for a new trial. Because of our resolution on this basis, we do not address the other issues raised by appellant in his appeal.

JOE W. CONTRERAS, Presiding Judge

CONCURRING:

MELVYN T. SHELLEY, Judge

SUSAN A. EHRLICH, Judge

Supreme Court
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Noel K. Dessaint
Clerk of Court

Kathleen K. Kempley
Chief Deputy Clerk

December 5, 1990

RE: STATE OF ARIZONA vs. PATRICK HENRY LENGYEL
Supreme Court No. CR-90-0202-PR
Court of Appeals No. 1 CA-CR 88-921
La Paz County No. CR 88-15

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 4, 1990, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Cameron voting to grant.

Record returned to Court of Appeals, Division One, Phoenix, this 5th day of December, 1990.

NOEL K. DESSAINT, Clerk

TO:

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(2)

No. 90-1136

Supreme Court, U.S.
FILED
APR 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

STATE OF ARIZONA,

Petitioner,

vs.

PATRICK HENRY LENGYEL, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Although the Petition, at i, presents only a single question, the body of the argument raises three issues. None of these issues is of sufficient importance to warrant granting the Writ of Certiorari. Further, should such a writ be issued, it is clear that this Court must rule against the Petitioner, the State of Arizona.

The first issue raised is whether the Arizona Court of Appeals erred in holding that the Sixth Amendment Confrontation Clause prohibited the prosecution from introducing hearsay statements allegedly made by a nontestifying, but available child witness. This Court has issued two lines of decisions which make it clear that the State of Arizona's claim is without merit. First, the Court has prohibited prosecutors from substituting hearsay for the testimony of available witnesses. *See, e.g., Ohio v. Roberts*, 448 U.S. 56 (1980). Secondly, recent decisions have struck a balance between protecting the emotional well-being of child witnesses, while also preserving the right to face-to-face confrontation for the criminally accused. *See Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

As to out-of-court declarations, the State of Arizona ignores the numerous decisions in which this Court has prohibited prosecutors from using hearsay in the place of available witnesses. The state attempts to place reliance on this Court's decision allowing the prosecution to introduce co-conspiratorial statements without demonstrating the declarant to be unavailable. *United States v. Inadi*, 475 U.S. 387 (1986). The state claims that the same ruling

should apply to a largely undefined, previously unrecognized, class of hearsay statements by children. The State of Arizona's argument ignores the fact that *Inadi* created a small exception to the usual unavailability requirement by allowing a narrow, well defined category of hearsay to be admitted.

There is no reasonable analogy between that case and this one. Co-conspiratorial statements, unlike the hearsay here, are made during the commission of the crime between partners who frequently become adversaries by the time of trial. The unavailability requirement for co-conspiratorial statements would place an unreasonable burden on the government, while providing little benefit to the defense. Most importantly, the co-conspirator exception has been defined through centuries of jurisprudence. None of these criteria supporting the *Inadi* decision are presented here. The State of Arizona's position is untenable.

As to the second line of cases, *Coy* and *Craig* defined and approved of methods of protecting child witnesses. If the prosecution presents evidence prior to trial establishing that the witness would be emotionally harmed by facing the defendant, the witness may testify through a one-way video system so that the jury can view the witness' demeanor and the defense can cross-examine the witness. The State of Arizona's absolute failure to utilize this procedure cannot be rewarded by denying the right of confrontation. The Arizona appellate court was clearly correct in reaching this conclusion.

Finally, to the extent this Court may wish to explore the elimination of the unavailability requirement for

other categories of hearsay, the facts of this case are not appropriate for such inquiry. The present case largely involves statements which fall within no established exception to the prohibition against hearsay. To the extent that some of the statements by the three year old declarant fall within the literal definition of the exception for statements made for medical diagnosis or treatment, the foundation upon which the reliability of such statements are made is lacking here. A three year old does not comprehend the importance of being truthful when speaking to any adult, particularly where, as here, the statements had nothing to do with the child's physical well being.

The State of Arizona seeks to create a broad category of cases in which the only direct evidence would be removed from the courtroom, thus allowing conviction by hearsay. Such a system cannot exist under the Constitution of the United States. There is simply no basis for this Court to grant review in this case.

The State of Arizona's second argument is that Respondent, Patrick Lengyel, waived his Sixth Amendment rights by failing to subpoena the child witness himself. The Arizona Court of Appeals, based upon its review of the record, correctly found that Mr. Lengyel had no actual ability to subpoena the witness. That court therefore declined to reach the question posed by the State of Arizona here. That question is not properly before this Court and may not form the basis for the granting of a Writ of *Certiorari*.

Third, the State of Arizona argues that the state appellate court incorrectly ruled that the error committed

by the trial court was not harmless. This question is not properly raised by the question presented in the Petition for Writ of *Certiorari*.

Further, this Court has issued numerous decisions which well define the harmless error rule. No additional decisions are needed. Finally, it is clear that the appellate court's decision is well-supported by the record.

REASONS FOR DENYING THE WRIT

I. UNAVAILABILITY REQUIREMENT AND THE CHILD WITNESS

Through its Petition for *Certiorari*, the State of Arizona asks this Court to create an exception to the Sixth Amendment which would mark a radical departure from any path followed or even contemplated in two hundred years of American jurisprudence. The state seeks a broad, undefined, exception to the Confrontation Clause which would exempt youthful accusers from appearing before the defendant and the jury.

This question does not merit serious consideration by this Court. Two separate lines of decisions interpreting the confrontation clause make it clear that Petitioner's argument has no merit. First, decisions concerning the admissibility of hearsay under the Confrontation Clause establish that, in the usual case such as this one, the prosecution may not substitute hearsay for the testimony of an available witness. Secondly, recent opinions defining the right of an accused to face a juvenile accuser in the courtroom remove any doubt as to the weakness of the State of Arizona's claim.

A. The Prohibition Against Hearsay

In *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139 (1990), this Court addressed the admissibility of hearsay statements from a small child under the confrontation clause of the Sixth Amendment. Petitioner opens, at 12-13, by noting that the *Wright* opinion does not address the question of whether the usual witness unavailability requirement applies to children. As the Court's opinion clearly indicates, that question was simply irrelevant under the facts of *Wright*. The State of Arizona urges that this issue is a matter which requires the Court's attention.

The state fails to recognize that a long line of decisions interpreting the Confrontation Clause make it clear that the Court would never adopt such a broad exception. Even before the turn of the century, this Court unequivocally stated that every individual accused of crime has the right to:

> [E]xamination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). *See also Kirby v. United States*, 174 U.S. 47, 55 (1899).

The Court's more recent decisions demonstrate that the Confrontation Clause rarely will permit the prosecution to substitute hearsay for an available witness. *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S.

719, 721 (1968). In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), the Court declared, "[I]n the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." (Citations omitted).

This Court has never departed from the position that, "in the usual case," the prosecution must place its available witnesses before the jury. The State of Arizona attempts to transform this rule into the exception, citing *United States v. Inadi*, 475 U.S. 387 (1986). That decision carved out a small exception to the availability rule for the introduction of co-conspirators' statements. *Id.* at 399-400. That conclusion was reached, however, for reasons peculiar to co-conspiratorial statements. Such statements are made in context during the commission of the offense. The relationship between declarants and defendants often, if not usually, change from partners at the time the statements are made to adversaries at the time of trial. Requiring the prosecution to produce every party to co-conspiratorial statements would place an enormous burden on the government and provide little or no benefit to the defense. Perhaps most importantly, the rules for deciding the reliability and admissibility of co-conspirators' statements have been developed and tested through centuries of jurisprudence.

None of these circumstances exist for hearsay from juveniles. Whether spoken to a parent or social worker, or spoken in Court, the statements consist of assertions of past events. The accuser-accused relationship does not change. Certainly, it cannot be claimed that requiring the government to produce an alleged victim is unduly

burdensome. Again perhaps most importantly, no such exception is found in the history of the American judicial system. Under these circumstances, the following quotation from *Inadi* is applicable:

> When two versions of the same evidence are available, long-standing principals of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

(citations omitted). *Id.* at 1126.

The State of Arizona also relies on a handful of lower court decisions which were issued after *Inadi*, but preceded *Wright*, for the proposition that the unavailability requirement will be cast aside right and left in future decisions of this Court. Petitioner further argues that the absence of an unavailability requirement in Rule 803 of Evidence should control the Confrontation Clause. *See* Petition at 18-20.

In *Idaho v. Wright, supra*, however, this Court made clear that *Roberts* is the rule and *Inadi* the exception. Further, the Court reaffirmed its position that the Rules of Evidence will not control the Confrontation Clause:

> In *Ohio v. Roberts*, we set forth 'a general approach' for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U.S. at 65, 100 S.Ct. at 2538. . . . [I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. *Ibid.* (Citations omitted).

110 S.Ct. at 3146.

There are no facts or circumstances in the present case which remove it from the *Roberts* "usual case" analysis. There is no sound reason for this Court to address the State of Arizona's Petition on its merits.

B. Face-to-Face Confrontation

Two recent Confrontation Clause decisions did not address the admissibility of hearsay but do establish sound basis for rejection of the Petition filed here. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court first addressed the constitutionality of recently developed measures used to facilitate the testimony of child witnesses who are alleged to be victims in criminal prosecutions. In *Coy*, the prosecution, in reliance on a state statute, placed a screen between the accused and the child witnesses during their trial testimony. *Id.* at 1014-1015.

Although this Court recognized the state's interest in protecting children, it found that the Sixth Amendment would not permit this broad, new exception to the right of face-to-face confrontation. In reaching its conclusion, the Court specifically relied on the same analytical framework used to decide the admissibility of hearsay:

> The exception [to confrontation] created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

Id. at 1021.

The Court applied the same analytical framework in *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157 (1990). There, the Court upheld the use of a one way video system by which the child witnesses gave live testimony, seen on a television monitor by the jury and the defendant, and subject to cross examination. *Id.* at 3161-3162. The Court upheld this procedure, based on a Maryland statute, only because specific measures were taken to ensure that the rights of the accused were not cast aside simply due to a general desire to protect child witnesses. These measures included the presentation of evidence prior to trial concerning the trauma to the child, a safeguard that was not employed in the present case. *Id.* The Court held that, before a video system may be used in any case:

> The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis* . . . . (citations omitted)

Id. at 3169. The Court upheld the Maryland statute which required that the video system be used only if the child would suffer "serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. §9-102(a)(1)(ii).

Craig's case-specific rule furthers the goal of promoting just results at trial. Unfortunately, false allegations of abuse are made. P. Lees-Haley, "Innocent Lies, Tragic Consequences: The Manipulation of Child Testimony," *Trial* 37-41 (April 1988). Further, recent clinical studies have found that children often are not fearful of the perpetrator of sexual abuse. Corwin, Berlinger, Goodman, Goodwin & White, "Child Sexual Abuse and Custody Disputes: No Easy Answers," 2 *Journal of Interpersonal Violence* 91 (1987).

If hearsay could simply be substituted for live testimony, the *Craig* decision and the many state statutes[1] protecting child witnesses would be unnecessary. In *Craig*, the Court specifically found that techniques such as were used there strike a balance between protecting both child witnesses and the rights of the accused under the Confrontation Clause. *Id.* at 3169. There is therefore no need for the broad denial of confrontation that would result from the ruling sought by the State of Arizona. Such a rule would substitute hearsay for face to face confrontation and thereby deprive the accused of the ability to "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 3166-3167, *quoting Coy v. Iowa*, 487 U.S. at 1020.[2]

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[1] The Arizona Legislature has enacted a similar statute, but no attempt to utilize it was made here. 110 S.Ct. at 3168, n.3.

[2] The State of Arizona, at 21, cites *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987), for the proposition that "[I]t is a fact well known to child abuse experts that sexually abused

(Continued on following page)

Particularly when applied to states such as Arizona, the rule urged by the Petitioner would deny any measure of confrontation of an accuser at any stage in the proceedings. Arizona has recently adopted a so-called "Victim's Rights" measure which changed the long-standing rule in Arizona formerly giving a defendant in any criminal case the right to interview his accuser. *Compare* Ariz. Const. Art. II, §2.1(5) with 17 A.R.S. Rules of Criminal Procedure, Rule 15.3. Thus, the current state of the law in Arizona is that a criminal defendant in a child abuse case does not have the right to interview his accuser pre-trial. If the rule urged by the Petitioner herein were adopted, a criminal defendant in Arizona would also lose his ability to examine his potential accuser at trial. Thus, a criminal defendant in these types of cases could be convicted without ever having the ability to interview or examine under oath his accuser in order to undermine his credibility and present all of the facts and circumstances of the case to the trier of fact. Our system has long-recognized that cross-examination is the crucible in which the truth is tested. The rule urged by the Petitioner herein would completely eviscerate that entire process.

The position forwarded by the State of Arizona is contrary to all decisions of this Court interpreting the Confrontation Clause. There is, therefore, no reasonable basis for issuing the Writ of *Certiorari*.

(Continued from previous page)

youngsters often do recant . . . " 732 S.W.2d at 823. This was the testimony of a single witness, not the finding of the court. *Id.*

C. Absence of Justiciable Facts

The foregoing analysis does not, of course, lead to the conclusion that only co-conspirator statements will be exempted from the unavailability requirement of the Confrontation Clause. If the Court is to explore other such exceptions, however, this case presents a very poor factual setting for that purpose.

The State of Arizona has conceded throughout that most of the evidence at issue is not admissible under any established exception to the hearsay rule. Petition at 13. No presumption of reliability can therefore be found as is the case with established exceptions. *See Coy v. Iowa*, 487 U.S. at 1021.

The state also contends that some of the extrajudicial statements at issue fall within the medical diagnosis exception to the hearsay rule. Rule 803(4) of Evidence.[3] While this may be true under the literal language of Rule 803(4), the foundation upon which a finding of reliability for such evidence is based does not exist here. Evidence is admitted under this exception based upon the reasonable premise that an individual will not mislead a physician on matters related to the patients health and well being. 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(4)[01]. While this certainly makes sense in the case of competent adults, it is highly unlikely that a three year old child, such as the alleged victim in the present case, would view a health care provider as anything other than just another adult. Further, even if it could be assumed that the child recognized the importance of health issues, the evidence

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[3] The federal and Arizona Rules are identical.

at issue here consists of statements concerning past events that have no direct relation to health care at all:

> [E]ither because of the subject matter or the characteristics of the declarant, a child may have no subjective appreciation of the importance of the inquiry to medical treatment. When the statement concerns matters related only to psychological well being, subjective appreciation of the treatment implications of a statement are likely as a class to be weak, and are likely to be particularly weak under some circumstances, such as when the statements are made by very immature children or when children are questioned in the context of play.

(footnote omitted). B. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L.Rev. 257, 266 (1989).

The State of Arizona asks this Court to enter a ruling so broad that it would transcend the judicial function. Petitioner's essential request is that the Court enact an exception to the Confrontation Clause that would allow for the introduction of hearsay statements made by children who are available as witnesses even when the statements fall within no established exception to the Sixth Amendment or the rules of evidence and would not normally be admissible at all.

Petitioner's position is both tenuous and oblique. Where does this exception begin and end? Does it apply only to certain offenses? Would it come into play only in cases in which children were alleged to be the victims? If so, would the result not be to allow the use of hearsay when the child's testimony is central to the case against the accused, while requiring children to appear in court

when they give evidence of limited significance? At what age would children be deemed to be sufficiently mature to take the witness stand? Would this determination be based solely upon the child's date of birth, or would some form of a maturity test be given?

In essence, Petitioner asks this Court to create an expansive new exception to the Confrontation Clause, something that the Court has steadfastly refused to do throughout its history. In the end, Petitioner falls on its own sword, for in *Inadi* the Court again made it clear that it would continue its uninterrupted practice of analyzing the admissibility of extrajudicial statements under the Confrontation Clause by examining narrow exceptions to the prohibition against hearsay. *United States v. Inadi*, 475 U.S. at 392-393.

This case presents no reasonable question for the Court's decision. The Petition for a Writ of *Certiorari* should therefore be denied.

II. RESPONDENT'S FAILURE TO SUBPOENA CHILD WITNESS

The State of Arizona next asks this Court to grant *certiorari* for the purpose of finding that Respondent, Patrick Lengyel, waived his confrontation right by failing to subpoena the child declarant himself until the beginning of trial. Petition at 22-23. While Petitioner's statement of the underlying facts[4] is accurate as far as it goes, a more complete version of events was provided by the Arizona Court of Appeals. In that decision, the court,

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[4] *See* Petition at 11-12.

based upon the record before it, refused to decide the issue which Petitioner attempts to raise here, stating:

> We do not reach the question of whether the requirement that the state either produce the declarant at trial or make a showing of unavailability may be satisfied with a showing that the defendant could subpoena the declarant because we believe that, in this case, appellant's [Mr. Lengyel's] right to subpoena the victim was illusory. Prior to trial, the State, in its Motion for Protective Order and for Finding of Witness Unavailability, asked the court to preclude appellant from calling the child as a witness. On the first day of trial, when the trial court denied the motion, the trial court instructed appellant that he could subpoena the victim. At this late stage of the proceeding, it would have been nearly impossible for appellant, who was in custody, to have located the child and subpoena her, particularly in light of the trial court's refusal to require the state to disclose her whereabouts when appellant asked for the court's assistance.

(footnote omitted). App. 7.[5] The state appellate court was clearly correct. *Barber v. Page*, 390 U.S. at 725-726. That Court therefore reasonably and properly declined to address the issue the state seeks to present here. Because this issue was not decided below, it should not be considered here. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983), *quoting, State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945).

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[5] While a copy of the Court's Memorandum Decision is appended to the Petition for Writ of *Certiorari*, it is also appended here for the Court's convenience.

In addition, the absence of a decision below on this issue lends further support for the denial of *certiorari* as to Issue I above. In *United States v. Inadi*, the case most heavily relied upon by the State of Arizona, this Court's finding that there was no violation of the Confrontation Clause was based, in part, on the defendant's ability to subpoena the declarant to appear at trial. 475 U.S. at 397. Because Mr. Lengyel did not have that ability in the present case, this matter presents an incomplete picture precluding complete consideration by this Court.

III. HARMLESS ERROR

Petitioner also asks this Court to conduct a harmless error analysis should it find Respondent's Sixth Amendment rights were violated. Petition at 23-24.

Initially, this issue is not fairly included within the question presented by Petitioner. *Id.* at i. The Court should decline to address this issue on this basis alone. Sup.Ct.R.14.1(a).

To the extent that this question is properly presented, this Court has issued a long series of decisions which adequately define the harmless error rule. *See, e.g., Arizona v. Fulminante*, ___ U.S. ___ (Supreme Court Case No. 89-839, March 26, 1991); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Hasting*, 461 U.S. 499, 508-509 (1983); *Moore v. Illinois*, 434 U.S. 220, 232 (1977); *Milton v. Wainwright*, 407 U.S. 371 (1982); *Chapman v. California*, 386 U.S. 18, 24 (1966). Indeed, in *Coy v. Iowa*, the Court declined to pass on the harmless error question arising from the denial of the defendant's confrontation rights,

instead remanding the matter to the state court for decision. 487 U.S. at 1022.

It is further clear that the Arizona appellate court was correct in finding that the error here was not harmless. Beyond the inadmissible hearsay, the only significant evidence against Mr. Lengyel was a videotape of the alleged victim and a social worker. The allegations of misconduct gleaned from that tape were oblique and far less damaging than the inadmissible hearsay. In light of the fact that Respondent testified in his own defense and presented several character witnesses who testified on his behalf, the appellate court's refusal to find harmless error cannot reasonably be questioned.

There is no need for the Court to rule on any harmless error issue that might arise here. The Petition for Writ of *Certiorari* should therefore be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the State of Arizona's Petition for Writ of *Certiorari* should be summarily denied.

Respectfully submitted,

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[FILED APR 3, 1990]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. PATRICK HENRY LENGYEL, Appellant.	1 CA-CR 88-921 DEPARTMENT A MEMORANDUM DECISION (Not for publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of La Paz County

Cause No. CR-88-15

The Honorable Steven F. Conn, Judge

REVERSED AND REMANDED

Robert K. Corbin, The Attorney General
by Jessica G. Funkhouser, Chief Counsel
Criminal Division
and
Diane M. Ramsey, Assistant Attorney General
Attorneys for Appellee — Phoenix

Yvonne J. Ayers
Attorney for Appellant — Tucson

and

Walter B. Nash
Attorney for Appellant — Tucson

CONTRERAS, Presiding Judge

Appellant was tried before a jury and convicted of two counts of molestation of a child on two separate

occasions between July 1985 and April 1986. He was sentenced to two consecutive terms of twelve years imprisonment. On appeal, we consider the issue of whether the trial court denied appellant his constitutional right to confront his accuser. We reverse because we conclude that the appellant was denied such right. We reach this conclusion based upon our determination that the trial court erred in admitting the victim's hearsay statements without an express finding that the victim was unavailable.

FACTS

The amended indictment charged appellant with the molestation of his natural daughter on two separate occasions between July 1985 and April 1986. Appellant lived sporadically with his daughter and her mother until April 1986. The child was nineteen months to two and a half years old when the alleged molestations took place.

The mother testified that she became suspicious of appellant's activities with the child before the child turned two years old. Later, the mother noticed that the child frequently had nightmares and was incontinent, although she had been toilet trained. Initially, however, the mother did not report her suspicions to the authorities.

The mother also testified that one afternoon the child awoke from a nap crying. While still groggy, she told her mother that a monster was going to get her. The mother questioned her about the monster, and the child told her mother that the monster was daddy. When asked what daddy had done to her, she purportedly told her mother,

"he puts sticks in my pee-pee." Fearing her suspicions were correct, the mother, in October of 1987, reported her belief that her daughter had been sexually molested by appellant.

On October 30, 1987, the child was interviewed by Susan Ashling, a social worker at the Children's Hospital and Health Center, Center for Child Protection, in San Diego, California. She concluded that there had been vaginal-penile contact between the child and appellant. The entire interview was videotaped.

On this same day, the child was examined by Dr. Sylvia Strickland, a pediatrician. Dr. Strickland testified that she found evidence of hypervascularity, abnormal blood vessels, in the child's genital area which had likely been caused by dry intercourse. She stated that the condition indicated numerous separate molestive episodes over a period of several months.

The child's out-of-court statements concerning the alleged molestations were admitted at trial through the testimony of the mother and the social worker. A videotape of the interview between the social worker and the child was also admitted and played to the jury in its entirety. Jackie Scheider, a pschotherapist-counselor at the Life Health Center of Parker, also testified to the child's out-of-court statements about the alleged molestations made during seven counseling sessions with the child.

Appellant firmly denied the allegations that he had molested his daughter and claimed that the child's mother had fabricated the story and turned his daughter against him.

DISCUSSIONS

Appellant, who was in custody, represented himself for most of the proceedings, including the trial. Prior to trial, the state filed a Motion for Protective Order and for Finding of Witness Unavailability in which the state asserted that the child was unavailable to testify because she would be traumatized by the proceedings. The trial court withheld ruling on this motion. On the first day of trial, the trial court issued its ruling on this motion and specifically refused to find the child unavailable. The trial court pointed out, however, that the state need not call the child as a witness. Appellant asserted his right to confront the child on the ground that she was the only person who could explain her out-of-court statements and the only person who had any knowledge of the allege molestations. Upon appellant's request that the child testify at trial, the trial court pointed out that appellant had the right to subpoena her as a witness for the trial.

On the second day of trial, appellant attempted to subpoena the child by serving her mother, who appeared as a witness at the trial. The state objected to service on the mother, arguing that service on a minor child cannot be made solely by service on the mother. The trial court agreed. The trial court also pointed out to appellant that if the child was in the state of California, as alleged by the prosecutor, appellant would need to follow the requirements of the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. A.R.S. § 13-14091 through 13-4096. Appellant objected to conducting the trial without the testimony of the child, stating that the child was the "only witness to the alleged crimes and without a witness all

this other testimony has been opinions – other people's opinions."

The state did not call the child as a witness, and appellant was unable to subpoena the child as a witness at trial. However, the child's out-of-court statements as to the alleged molestations were admitted at trial through the testimony of her mother, the social worker and the psychotherapist-counselor. The trial court also admitted the videotape of the interview between the social worker and the child. In making its rulings admitting these hearsay statements, the trial court specifically ruled that there was no denial of appellant's constitutional right to confrontation because "the defendant can and could at anytime have subpoenaed [the child] and have her brought into court and have been able to confront her face-to-face concerning these accusations. . . . " Appellant objected to the admission of the hearsay statements.

In its ruling on the admissibility of the hearsay statements, the trial court apparently interpreted Arizona law as not imposing any requirement on the state to try and produce an available declarant as a witness when hearsay statements of that declarant are to be used at trial. Although appellant's confrontation rights do not require the state to call the victim as a witness, *State v. Valdez*, 160 Ariz. 9, 12, 770 P.2d 313, 316 (1989), the admission of the child's hearsay statements into evidence at this trial violated appellant's right to confront his accuser because the state did not make the required preliminary showing of unavailability of the witness for trial. *State v. Robinson*, 153 Ariz. 191, 203, 735 P.2d 801, 813 (1987); *Cf. State v. Vincent*, 159 Ariz. 418, 427, 768 P.2d 150, 159 (1989) (trial court must make individualized finding of necessity prior

to admission of videotaped testimony of minors); *State v. Allen*, 157 Ariz. 165, 170, 755 P.2d 1153, 1158 (1988) (burden on state to prove unavailability when it offers declarant's out-of-court statements). Our supreme court has explained the relationship of the confrontation clause to the admission of hearsay statements of a victim of alleged child molestation as follows:

> The confrontation clauses of the state and federal constitutions guarantee criminal defendants the right to confront their accusers. Ariz. Const. art. 2, § 24; *State v. Edwards*, 136 Ariz. 177, 665 P.2d 59 (1983); U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965). This right protects the accused's ability to confront and cross-examine his accusers face-to-face. *Edwards*, 136 Ariz. at 180-81, 665 P.2d at 62-63. "Notwithstanding its essential nature in securing a fair trial," however, "the confrontation clause has never been interpreted literally to require the exclusion of all statements of persons who do not appear at trial." 136 Ariz. at 181, 665 P.2d at 63. "[C]onsiderations of public policy and the necessities of the case," *Mattox v. United States*, 156 U.S. 237, 243, 15 S. Ct. 337, 340, 39 L.Ed. 409 (1895), permit dispensing with confrontation at trial if two conditions are met: (1) the declarant's in-court testimony is "unavailable," and (2) the declarant's out-of-court statement bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 67, 100 S. Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

Robinson, 153 Ariz. at 203, 735 P.2d at 813, *see also id.* at n. 15; *accord Allen*, 157 Ariz. at 170, 755 P.2d at 1158.

In this case, not only did the state not bear its burden of showing the declarant's unavailability, the trial court

specifically refused to find her unavailable, and upheld the admission of the hearsay statements on the ground that the witness was available to be subpoenaed by appellant. The trial court's ruling that the victim was not "unavailable" is not contested in this appeal. It is our opinion that the state was required either to produce the declarant at trial or make a showing of unavailability, and, therefore, the admission of the child's out-of-court statements in this case violated appellant's constitutional confrontation rights.

We do not reach the question of whether the requirement that the state either produce the declarant at trial or make a showing of unavailability may be satisfied with a showing that the defendant could subpoena the declarant because we believe that, in this case, appellant's right to subpoena the victim was illusory. Prior to trial, the state, in its Motion for Protective Order and for Finding of Witness Unavailability, asked the court to preclude appellant from calling the child as a witness. On the first day of trial, when the trial court denied the motion, the trial court instructed appellant that he could subpoena the victim. At this late stage of the proceeding, it would have been nearly impossible for appellant, who was in custody, to have located the child and subpoena her, particularly in light of the trial court's refusal to require the state to disclose her whereabouts when appellant asked for the court's assistance.[1]

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[1] We find troubling appellant's assertion that the state participated in making the victim unavailable. Although the state need not secure the attendance of witnesses for the defendant, if the defendant is unable to serve potential witnesses

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The state argues that even if the admission of the hearsay testimony was error, it was harmless error. In support of this argument, the state asserts that because the videotape between the social worker and the child was admitted by stipulation, the hearsay statements were merely cumulative and, therefore, harmless. We decline to find harmless error in this case. Most of the evidence linking appellant to the allege molestations of the child were the witnesses' recounting of statements made by the child. We have reviewed the videotape, and find that the hearsay statements testified to at trial went far beyond the somewhat vague and inconsistent references to the alleged molestations made in the videotaped interview. The witnesses' testimony as to the child's out-of-court statements, therefore, was not cumulative, and we cannot say that it is clear beyond a reasonable doubt that the jury verdict would have been the same had the hearsay statements not been admitted. *See State v. McVay*, 127 Ariz. 450, 453, 622 P.2d 9, 12 (1980); *State v. Wilhite*, 160 Ariz. 228, 772 P.2d 582 (App. 1989).

For the foregoing reasons, we reverse the judgment of conviction and remand the case for a new trial.

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because of "the suggestion, procurement, or negligence of the government," there would be a violation of the defendant's rights under the compulsory process clause of the Arizona and United States Constitutions. *State v. Stewart*, 131 Ariz. 407, 410, 641 P.2d 895, 898 (App. 1982). We cannot ascertain the truth of this allegation on this record.

Because of our resolution on this basis, we do not address the other issues raised by appellant in his appeal.

JOE W. CONTRERAS,
Presiding Judge

CONCURRING:

MELVYN T. SHELLEY, Judge

SUSAN A. EHRLICH, Judge